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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 85 383

LEO LICHTENSTEIN, LIBBIE LICHTENSTEIN and BYRON J. LICHTENSTEIN, individually and trading as Harlich Manufacturing Company and Loomis Manufacturing Company,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Petitioners' Reply Brief

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vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITIONERS' REPLY BRIEF.

This Proceeding is in Conflict with the Bunte Case.

The Commission's brief is an open and frank confession that the case at bar is an unjustifiable attempt on the part of the Commission to circumvent, side step, and annul the case of *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349. It seems that in spite of what this Court held in the *Bunte* Case, the Commission has an uncontrollable desire to bring within its jurisdiction the entire field of intrastate commerce, even to the extent of including therein those intrastate transactions which have no effect on interstate commerce. To realize this desire the Commission in the *Bunte* case issued a complaint proceeding directly against an intrastate method of com-

petition. This Court in that case held that intrastate transactions are not within the Commission's jurisdiction. The Commission having been denied the right to proceed directly against intrastate transactions instigated this proceeding in an effort to accomplish indirectly that which this Court has held the Commission does not have jurisdiction to do directly.

This attempt is not only in direct conflict with the *Bunte* case but is, also, contrary to what this Court said in the case of *U. S.* v. *Miller*, 297 U. S. 1, at page 68.

> "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted.
>
> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws *for the accomplishment of objects not intrusted to the government;* it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land! *McCulloch* v. *Maryland*, 4 Wheat 316, 423" (Italics provided)

Petitioners base the above comments on the fact that the Commission's brief sets forth and agrees with petitioners that the opinion of the Court below in this case is based and predicated solely upon the principle that the intrastate use of punch boards to distribute merchandise is a violation of the Federal Trade Commission Act and that being so petitioners because they furnish the punch boards, no other merchandise, so aid and abet, induce and procure these intrastate transactions that they themselves are within the purview of the act. Petitioners contention is that the above holding is contrary

to and in direct conflict with this Court's holding in the *Bunte* Case that these intrastate transactions are not a violation of the act. The *Bunte* case holds that there is no violation, therefore, there is no aiding, abetting, inducing and procuring.

A discussion of the Commission's brief will substantiate the above statement.

The Commission's first contention (page 5 of its brief) that this Court in the *Keppel* Case held that these intrastate transactions are a violation of the act is erroneous. (quoting from page 5:)

> "We submit that this case is governed in every essential respect by *Federal Trade Commission* v. *Keppel Bros., Inc.,* 291 U. S. 304 (1934)."

Thus it is clear that the petitioners rely on the *Bunte* case and the respondents rely on the *Keppel* Case. The following discussion, petitioners think, will make the correctness of their position and the fallacy of the Commission's position self-evident.

The claim that the *Keppel* Case is controlling herein, is based solely upon the erroneous theory and contention that the *Keppel* Case held, contrary to the *Bunte* Case, that these intrastate transactions are a violation of the act. The Commission in its effort to substantiate this contention sets forth (page 5 and 6 of its brief) a distorted and false paraphrasing of a statement from the *Keppel* case.

It is apparent that the statement was paraphrased instead of being quoted in *toto* for the sole and only purpose of misleading this Court to the erroneous and false conclusion that the *Keppel* case held that the use of a chance devices in intrastate commerce to distribute merchandise is within the purview of the Federal Trade

Commission Act. A glance at the statement unparaphrased will emphasize the distortion and the falseness not only of the paraphrasing but, also, of the contention made.

The statement from the *Keppel* case is as follows:

> "The practice in this case presents the same dilemma to competitors, and we can perceive no reason for distinguishing between the element of chance as employed here and the element of deception involved in labelling cotton goods 'Natural Wool', as in the *Hinsted* Case. It is true that the statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men. *But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves.* It employs a device whereby the amount of the return they receive from the expenditure of money is made to depend upon chance. Such devices have met with condemnation throughout the community. Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal satatutes have long deemed contrary to public policy. For these reasons a large share of the industry holds out against the device, despite ensuing loss in trade, or bows reluctantly to what it brands unscrupulous. It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not 'unfair'." (Italics provided)

It should be noted that the Court in the *Keppel* Case found the presence of fraud and deception; two factors which it is admitted are not present in the case at bar.

The Commission's use of the pronoun "them" at the top of page 6 is for the purpose of making it appear that this Court in the *Keppel* Case said,

> It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction to hold that *devices whereby the return for one's money is depent upon chance* is not unfair.

Whereas, it is self-evident from the above quotation from the case that the practice the Court was referring to when it said,

> "It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction to hold that the method is not unfair"

is not a chance device but was the method used by Keppel of so packing an assortment of candy in such a manner that when the candy was sold to the consumer the purchasers thereof would purchase a piece of candy for 1¢, and if this piece had a colored center the purchaser was given in addition a larger bar of candy. The proceeding was against this method of so packing the candy, it was not against any device. There is no such method in the case at bar.

The quotation makes it clear that the holding in the *Keppel* case is not that the use of a chance device is a violation of the act but it shows clearly that the holding is restricted, limited and confined to the principle of law that *a competitor can not use a method of competition in interstate commerce which casts upon his interstate competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt.* Therefore, the *Keppel* case does not hold, as the Commission would lead this

Court to believe, that the use of chance devices in the intrastate distribution of merchandise is an unfair method of competition or an unfair act or practice within the act.

As the Commission concedes that the petitioners' acts do not place their competitors in such a situation and it appearing that this is the only principle announced in the *Keppel* Case it is conclusive that the *Keppel* Case does not govern the case at bar.

Concerning the application of the *Keppel* Case to a case like the one at bar the Seventh Circuit in the case of *Modernistic Candies, Inc.*, v. *Federal Trade Commission*, 145 F. (2) 454, 455 expressly held that the *Keppel* Case does not govern cases like the one at bar. The court said:

> "The *Keppel* Case, however, does not cover the case at bar because the article sold here, the Ballgum board, is incomplete in itself as a game of chance. No prizes are provided."

The court below did not cite the Keppel case as governing herein, but cited it only on a principle of statute construction.

If the *Keppel* Case were to be construed to hold as the Commission contends it does, that is, that the intrastate use of chance devices is a violation of the statute the *Keppel* Case and the *Bunte* Case would be in direct conflict with each other. The Commission makes no claim that these cases are in conflict. The Commission as did the court below, as petitioners will show hereinafter, just refuses to recognize that the *Bunte* Case held that intrastate transactions are not within the purview of the act.

The above establishes beyond doubt that the *Keppel* Case did not hold as claimed by the Commission that the intrastate use of "*devices whereby the return for one's money is dependent upon chance*" is a violation of the Federal Trade Commission Act.

The Commission's next point (page 6 of its brief) would lead this Court to believe that all of the cases cited in the footnote on said page are in point herein.

The following quotation from page 6 of the Commission's brief while it may not be a direct misstatement of the holding in these cases it is most certainly misleading.

> "Orders of the Commission directed against interstate distribution of goods or products designed to promote sale at retail to consumers by appeal to the gambling instinct have been repeatedly before the various court of appeals."

As this statement worded as it is appearing in a case as it does, wherein punch boards are involved it is reasonable to assume that the Commission intended the statement to mean that the merchandise in those cases was designed in a manner identical or almost so as punch boards are designed to promote sales. This is far from the true fact. The difference between the two is this: In these cases cited in the foot note the goods or products were so packed and designed that their sales, not the sales of other goods, were to be made by gambling, that is the goods and products were so packed that the gambling feature was limited to the sale of those particular goods and products packed in the assortment. The parties proceeded against in these cited cases by using this practice and method as in the *Keppel* case placed their competitors in a position of loss of business unless they would descend to a practice which they were under a powerful moral compulsion not to adopt. While on

the other hand, petitioners sell only punch boards. Petitioners by doing so do not place their competitors in such a position or situation.

. All of these cases were decided on the identical principle of law announced in the *Keppel* case, therefore what is said above about the *Keppel* case and what will be said hereinafter about it applies to these cases with the same force and effect as it does to the *Keppel* case.

From that which is set out on page 12 of our brief, on the bottom of page 7, the bottom of page 8, and top of page 9 of the Commission's brief, it is inescapable that the application of the principle that one who aids, abets, procures and induces others to violate the Federal Trade Commission Act is himself a violator thereof to the case at bar as was done by the court below is in direct conflict with this Court's holding in the *Bunte* case.

To show the fallacy of applying the above principle to the case at bar it is important to set out the undisputed facts. From that which is set out on the pages of the briefs set out above it, also, appears that the undisputed facts herein are: that the order to cease and desist issued herein restrains the petitioners from shipping in interstate commerce only punch boards, no other merchandise, *to people who use them exclusively in intrastate commerce;* that these intrastate transactions have no effect in interstate commerce; that the petitioners' acts are not in themselves *per se* unfair acts or practices within the intent and meaning of the Federal Trade Commission act; that they are not unfair to competitors, purchasers or consumers; that there is no fraud or deception herein; that the Court below held that the only reason that the petitioners' acts are unfair, is because the petitioners, by shipping the devices in question so aid, abet, procure,

and induce others to violate the act; *that the court predicated its decision in sustaining the Commission's jurisdiction to issue the order herein on the sole and only principle that the intrastate use of punch boards to distribute merchandise is a violation of the Federal Trade Commission act (contrary to the Bunte case)*; and that petitioners because they ship only punch boards, no other merchandise, in interstate commerce so aid, abet, these intrastate transactions that they themselves come within the act; that the *Bunte* case held that intrastate transactions are not a violation of the act.

All of the above facts being admitted it is self evident that because this Court held in the *Bunte* case that these intrastate transactions are not a violation of the Federal Trade Commission Act, the contrary holding by the lower court herein that they are a violation of the act and, also, holding that the petitioners by aiding abetting, inducing, and procuring these said acts are themselves violators of the statute is in direct conflict with the holding in the *Bunte* case; under the *Bunte* case there is no violation therefore there is no aiding, abetting, procuring, and inducing.

In a foot note on page 9 of its brief, the Commission relies on four cases to sustain the erroneous principle of aiding, abetting, procuring, and inducing. These cases to some extent do sustain this contention. However, the following short discussion of each case will show that the theory upon which they are predicated is in direct conflict with the *Bunte* case.

The first one of these cases is the *Modernistic Candy, Inc.* v. *Federal Trade Commission,* 145 F. 2d 454.

The court on page 455 says:

> "We think the Commission also has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandising by gambling. The gamblers and those who deliberately and designedly aid and abet them are both engaged in practices contrary to public policy. Merchandising by gambling should not be divided into insulated acts, which appear innocent when examined separately. This unfair practice should be viewed as a whole. If the Federal Trade Commission is to police merchandising by gambling, it must police those who designedly and *deliberately aid and abet this practice. We think the Commission has such power.*" (Italics provided)

Thus it is obvious that this holding is based upon the theory that the Commission is to police the intrastate merchandising by gambling. The court's holding that the Commission has such authority as we have shown above is in direct conflict with the *Bunte* case. As the Commission has no authority to police intrastate merchandising by gambling it has no authority to police the ones who furnish only the punch boards to those who use them in intrastate commerce because these people do not violate the act. It is fundamental that the Seventh Circuit's holding that the Commission is to police the intrastate merchandising of gambling is contrary to and in direct conflict with the *Bunte* case. It is axiomatic that if there is no violation of the Federal Trade Commission Act there is no aiding, abetting, procuring, and inducing.

It is unfortunate that the *Bunte* case was not called to the court's attention in the *Modernistic* case. Had this been done undoubtedly the court would not have held as it did.

The court in the *Brewer* case, the next case cited by the Commission says:

> "For the reasons hereinafter appearing, we have reached the conclusion that, in thus *aiding and abetting, inducing and procuring* manufacturers and wholesale and retail dealers in merchandise to use *unfair or deceptive acts or practices and unfair methods of competition*, Charles A. Brewer and Son, though manufacturing no merchandise except the lottery devices which they ship in interstate commerce, fall within the restraining power of the Federal Trade Comission Act. (52 Stat. III.)" (Italics provided)

Thus it is seen that the Sixth Circuit assumed, contrary to this Court's holding in the *Bunte* case, that the intrastate use of punch boards to distribute merchandise is an unfair method of competition and unfair acts and practices within the meaning and intent of the Federal Trade Commission act and on this premise proceeded to hold erroneously that one who aids, abets procures and induces others to commit such intrastate transactions is himself a violator of the act.

As this theory is the sole and only basis upon which the court predicated its holding sustaining the Commission's jurisdiction to issue the order therein, the fallacy of such a holding is self evident because under the *Bunte* case there is no violation, therefore, there is no aiding, abetting, procuring, and inducing.

Unlike the *Modernistic* case the *Bunte* case was cited to the Sixth Circuit in the *Brewer* case. In applying the holding in the *Bunte* Case to the facts in the *Brewer* case, the court said:

> "The main reliance of petitioners is upon the opinion of the Supreme Court in *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349. It was

there held that the Federal Trade Commission is without authority under Section 5 of the Act to prevent an Illinois candy manufacturer from selling wholly within that State candy in 'break and take' packages, making the amount the purchaser receives dependent upon chance. In the concluding paragraph, the writer of the majority opinion said it was merely held that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce', requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished. The case is plainly distinguishable from that at bar, in that, in the *Bunte Brothers* case, the sale of the petitioner's products was entirely within the State of Illinois. Here, the petitioners ship in interstate commerce throughout the United States their manufactured lottery devices"

On this point the Commission on page 9 and 10 of its brief says:

"Petitioners rely upon *Federal Trade Commission* v. *Bunte Bros., Inc.,* 312 U. S. 349, which involved an order under Section 5 directed against a concern which sold only in intrastate commerce. The holding there that Section 5 is limited to practices employed 'in' interstate commerce and does not extend to practise which merely affect such commerce has no application here. Petitioners sold their punch boards and push cards in interstate commerce, so that there is clear jurisdictional basis for the proceeding against them."

Such a narrow and limited interpretation of the *Bunte* case applied to the case at bar is clearly erroneous because it does not only fail to recognize that this Court held in the *Bunte* case that the intrastate use of punch boards is not a violation of the Federal Trade Commission Act, but, it also, nullifies and treats at not the

significance and importance of such a holding. As the jurisdiction of the Commission to issue a cease and desist order in the case at bar is predicated and based solely upon the theory that one selling punch boards to people who use them exclusively in intrastate commerce is within the purview of the Federal Trade Commission Act, the fallacy of such a narrow interpretation and application of the holding in the *Bunte* case is self evident in the face of the following facts:

(1) that the Court in the *Brewer* case relied solely upon the principle that the intrastate transactions are a violation of the Federal Trade Commission Act, and that the petitioners by furnishing the punch boards used in these intrastate acts also violated the act.

(2) that to sustain such a holding the vital, crucial, and indispensable fact is that these intrastate transactions must be a violation of the statute because if they are not there can be no aiding, abetting, procuring, and inducing a violation of the act;

(3) that this Court held in the *Bunte* case that such intrastate transactions are not a violation of the act.

Instead of applying the holding in the *Bunte* case as it should have to the theory relied upon the Sixth Circuit in the *Brewer* case erroneously relied upon several other cases. The following discussion of which will reveal that these cases are not in point. To sustain its holding that the case at bar is controlled by the theory of aiding, abetting, procuring and inducing, the court in the *Brewer* case quote the following from the case of *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483.

> "And they (the facts in the case) show also that the *practice constitutes an unfair method of competition as against manufacturers of all wool knit*

underwear and as against those manufacturers of mixed wool and cotton underwear who brand their products truthfully, or when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods." (Italics supplied)

The court quoting further:

"The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his market for the honest product. *That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition.*" (Italics supplied).

"For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the *producer* of truthfully marked goods." (Italics provided.)

This quotation when the holding in the *Bunte* case is considered certainly does not sustain the holding made by the Sixth Circuit Court. The holding in the *Winsted* case is confined to the same rule of law as is announced in the *Keppel* Case, therefore, what has been said about the *Keppel* case applies to the *Winsted* case.

The Sixth Circuit seems to rely not so much on the *Winsted* case as it does on the rule of law of unfair competition, "*That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition,*" as announced in the *Winsted* case. This rule of law does not support the holding that the intrastate use of punch boards to distribute merchandise is an unfair act and furthermore it has no application to the case at bar,

because it is based upon fraud and deception, neither of which are present herein. This rule of law is not in point where there is no fraud or deception present. Most of the other cases cited by the court in the *Brewer* case fall in the category of the *Keppel* case so that which has been said about the *Keppel* case applies with equal force and effect to all of them.

Another reason why the *Winsted* case, and the rule of law of unfair competition have no application to the case at bar is, because in all those cases wherein the rule is applied the proceedings are against the *use* of the method, act or practice in selling merchandise. It is the method, act or practice used to sell the products that is restrained not the mere selling of the product itself. While on the other hand, in the case at bar the order is not against the *using* of any method, act or practice by which the punch boards are sold, but the order restrains the selling and shipping of the boards.

Section 5 of the Federal Trade Commission Act on this point provides as follows:

> "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from *using* unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce" (Italics provided)

Thus it is seen that the *Brewer* case is in direct conflict with the *Bunte* case, therefore, the Ninth Circuit herein was in error in relying upon it.

In addition to that which we have said about the *Globe* case in our brief let us add the following. The following statement in the *Globe* case seems to the petitioners to be inconsistent with each other:

> "The instant proceeding no doubt would have been beyond the jurisdiction of the Commission under the

> unamended Federal Trade Commission Act, as interpreted by the Supreme Court in *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643 (1931)."

The second statement is:

> "The opinion in the *Brewer* case relies in part on the common law rule of unfair competition that one who furnishes another with the means of consummating a fraud is himself a wrongdoer. See *Coca-Cola Co.* v. *Gay-Ola Co.*, 200 Fed. 720 (C. A. 6, 1921); see also *Federal Trade Commission* v. *Winsted Co.*, 258 U. S. 483 (1922). We agree that the above-stated rule can be applied as an apt analogy here."

It is beyond the comprehension of the petitioners to determine in what manner the amendment of 1938 so changed the act as to bring the application of the rule of unfair competition into existence.

From the quotation above it will be noted that the *Winsted* case was decided in 1922 but the Commission not until after the amendment of 1938 ever contended that this rule of law should apply.

The *Hamilton* case cited by the Commission does not discuss these questions. The only question urged in that case was that the order was too broad, therefore, it should be modified, which the Court therein did.

From that which we have set out hereinabove it is clear that the opinion above is in conflict with this Court's holding in the *Bunte* case.

The Rule of Aiding and Abetting Is not Applicable to the Federal Trade Commission Act.

Petitioners make the further contention that it is a violation of the rule of strict construction to apply the rule of aiding and abetting to the Federal Trade Commission Act.

The Court below and Commission on page 9 of its brief on this point places considerable emphasis on that which was said in public Law 906, 81st Congress, 2d session, the socalled slot machine law. If the passing of this law has any significance with regard to the case at bar, it seems to the petitioners that its application should favor petitioners' contentions instead of being adverse to them. If Congress intended to have the intrastate use of punch boards stopped, this law would have included a proper provision covering the subject. This law, in excluding from its provisions the shipping of slot machines into states wherein their use is legal, emphasizes that Congress has a definite policy not to prohibit the interstate shipping of merchandise into a state wherein the use of it is not illegal. Congress has always been very careful to observe this rule. However, the application of the rule that the aiding and abetting of acts committed exclusively in intrastate commerce is a violation of the Federal Trade Commission Act violates this policy, because the cease and desist order herein restrains the shipment of punch boards into states wherein their use is not illegal or against the public policy of the state; many states and subdivisions thereof have expressly legalized the use of punch boards and taxed them. Notwithstanding this, the Commission claims the power to stop their shipment into those states. Before it can be inferred that Congress intended to grant to an administrative body the power to stop the interstate shipment of merchandise into states wherein the use thereof is legal the language used in the statute must be unequivocal. That such a holding can only be made wherein the language in the statute is clear and unequivocal is emphasized by the fact that Congress excluded such shipments from the provisions of Public Law 906. Congress has always consistently and emphatically maintained such a policy.

The Rule of Aiding and Abetting Is in Conflict with the Case of Scientific Manufacturing Company Inc. v. Federal Trade Commission, 124 F. 2d 640.

The petitioners contend that the case of *Scientific Manufacturing Company, Inc.* v. *F. T. C.*, 124 F. (2) 640 is in conflict with the cases relied upon by the Commission. The *Brewer* case said concerning the *Scientific* case:

> "The opinion in *Scientific Manufacturing Co.* v. Federal Trade Commission, 124 F. (2d) 640 (C. C. A. 3), apparently conflicts with that in *Modernistic Candies, Inc.* v. *Federal Trade Commission, supra,* with which we find ourselves in accord. The *Scientific* case may perhaps be differentiated on the fact that, in selling pamphlets derogatory of aluminum cooking utensils, the petitioner in that case did not deal in devices but 'dealt' as stated by the court, 'in opinions and no more.' "

However, the Third Circuit, the same court wherein the *Scientific* case was decided, in the *Globe* case distinguished it.

But the Ninth Circuit herein says this about it.

> "The case of *Scientific Mfg. Co.* v. *Federal Trade Commission,* 124 F. 2d 640 (Cir. 3), made it clear that trade practices were the sole concern of the Commission."

In spite of what the Third Circuit said in the *Globe* case in distinguishing the *Scientific* case the petitioners contend that the following quotation from the *Scientific* case is still the law and is still in conflict with the principle of aiding and abetting.

The court says:

> "The Commission contends that its jurisdiction in the circumstances shown derives from the amendment of March 21, 1938, (c. 49 Sec. 5 (a), 52 Stat. 111, 15 U. S. C. A. sec. 45 (a)) which enlarged the original

Federal Trade Commission Act by adding thereto a denouncement of 'unfair or deceptive acts or practices in commerce' and by correspondingly empowering and directing the Commission to prevent the use of such acts, or practices. From this, the Commission argues that the petitioners, being commercially engaged in an interstate business (the sale and distribution of pamphlets) are amenable to the Commission's interdictions when any of their acts or practices are found by the Commision to be unfair or deceptive in respect of some article of commerce in an *unrelated trade and notwithstanding such acts or practices are neither unfair nor deceptive in respect of the petitioners' trade in interstate commerce.* * * * *Obviously, a grant of power so vast is not to be accorded an administrative body except upon legislative direction within constitutional bounds. This brings us then to the matter of congressiqnal intent for first consideration.*" (Italics provided).

The court also said:

"None the less, it was still the unfair acts of traders in the affected commerce that the Commission was empowered to enjoin * * * But the restrainable acts or practices in commerce continued to be such as are performed or perpetrated in the trade affected by the offenses, whether or not there is competition. In short, the Commission's intervention is limited to acts or practices in the affected trade. If the amendment were given any broader scope, the Act would relate to far more than trade practices * * *"

There Is a Conflict Among the Circuit Courts as to what Principles Should Govern Herein.

The Commission on page 7 of its brief announces a rather peculiar theory as to what is unfair within the meaning of the act. On this point in the *Globe* case the court said: "All the Commission need show now is that

there is an act or practice in commerce inimical to the public interest." The *Brewer* case by failing to comment on this principle by implication rejects it. However the court below herein expressly repudiates and doctrine, the Ninth Circuit says:

> "Nothing in the criminal proceeding of *United States* v. *Perry Halseth,* U. S. , decided January 7, 1952, question this saving clause respecting such power of the Commission as was exercised in the civil case of *Brewer* v. *Federal Trade Commission.* Nowhere has the Commission claimed the power to prohibit the transmission of such lottery devices in interstate commerce as such. The cases construing similar cease and desist orders have all concerned the use of lotteries in merchandising. *Globe Cardboard Novelty Co.* v. *Federal Trade Commission,* 192 F. 2d 44 (Cir. 3) is similarly limited and should not be construed as conferring a general power over lotteries as such. The case of *Scientific Mfg. Co.* v. *Federal Trade Commission,* 124 F. 2d 640 (Cir. 3), made it clear that trade practices were the sole concern of the Commission."

For the reasons hereinabove petitioners respectfully request that their petition be granted.

Respectfully submitted,

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Petition for Rehearing

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